In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 535

MICHELE MARCHESE AND JESSE DEL BONO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners assert no claims in this petition which were not previously urged upon this Court in prior petitions for certiorari during the course of this litigation.[1]

After a trial by jury, in 1958, in the United States District Court for the Southern District of California, petitioners were convicted of narcotics offenses and each was sentenced to imprisonment for a period of ten years. The court of appeals affirmed. *Marchese* v.

[1] Petitioners' contention that this case should be considered together with *Katz* v. *United States*, No. 35, October Term 1967, is without merit. This case involves the use of a transmitter which was concealed on the person of an individual to whom petitioners sold narcotics and is thus controlled by this Court's decision in *Lopez* v. *United States*, 373 U.S. 427.

United States, 264 F. 2d 892 (C.A. 9), certiorari denied, 360 U.S. 930, 938. In 1960, a motion to vacate sentence under 28 U.S.C. 2255, filed by petitioner Marchese was denied. His petition for a writ of habeas corpus, filed the following year, was dismissed for want of jurisdiction. This order was affirmed on appeal, the court taking the view that petitioner was not entitled to a hearing, whether his petition was treated as habeas corpus or as a motion to vacate sentence. *Marchese* v. *United States,* 304 F. 2d 154. However, this Court reversed the judgment and remanded to the district court "for reconsideration in the light of *Sanders* v. *United States,* 373 U.S. 1." *Marchese* v. *United States,* 374 U.S. 101.

The grounds for the motion were the alleged illegality of the use of evidence obtained by a recorder carried on the person of an informer, the alleged knowing use of perjured testimony and the suppression of evidence by the government. Without stating the basis of his ruling Judge Clarke, after a hearing, on September 30, 1963, reduced the sentence of Marchese to five years and, upon the basis that he had served four years and seven months with good behavior, ordered his immediate release. A similar ruling was made in December as to Del Bono who had also filed both a petition for writ of habeas corpus and a motion to vacate sentence. The court of appeals, finding that there was no merit in petitioners' allegations and that Judge Clarke had exceeded his jurisdiction both in purporting to reduce sentence under Rule 35, F.R. Crim. P., more than sixty days after

imposition of sentence or after final action upon review of the judgment, and in purporting to act administratively to make an allowance for "good time," reversed the order of the district court and directed that petitioners be remanded to custody forthwith. *United States* v. *Marchese*, 341 F. 2d 782. This Court denied certiorari, 382 U.S. 817.

Instead of remanding petitioners upon receipt of the mandate, the district court heard argument on petitioners' motions to file Amended Findings of Fact and Conclusions of Law and an Amended Judgment. On January 19, 1966, it ruled that the decision and order of the court of appeals were ambiguous and that it would therefore deny the motions without prejudice and certify the question of its jurisdiction to alter its previous findings to the court of appeals, petitioners to remain on bail pending such determination (Pet. App. A). Upon appeal from this judgment, the court of appeals affirmed the denial of petitioners' motion, stating that it had not, in its prior opinion, suggested or implied that the district court was to make any other or further findings. The court of appeals again ordered that petitioners be remanded to custody forthwith. The present petition seeks review of that order.

All of the questions presented in the present petition have previously been adjudicated in this litigation and have been raised in prior petitions for certiorari which were denied. The validity of the use of the electronic equipment was raised and decided upon the original appeal and again upon the collateral at-

tack.[2] The validity of petitioners' allegation of suppression of evidence and knowing use of perjured testimony, as well as the question of the district court's power to reduce the sentence, were determined upon the review of the collateral attack on the conviction. See the petition and government brief in opposition, No. 157, O.T. 1965, certiorari denied, 382 817. The present petition, therefore presents no new issue for review by this Court.

The petition for a writ of certiorari should be denied.

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[2] The *per curiam* opinion on appeal from the conviction did not discuss petitioners' contentions, 264 F. 2d 892, certiorari denied, 360 U.S. 930, 938. That use of electronic equipment was a principal issue appears from the petition and government brief in opposition, Nos. 922 and 898 Misc., O.T. 1958. This issue was again raised on collateral attack. 341 F. 2d at 787, 792–793, certiorari denied, 382 U.S. 817.

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